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Subcommittee on Water Resources and Environment

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Mr. Chairman, members of the committee, thank you for the opportunity to testify today. My name is Len Peters, and I am secretary of Kentucky's Energy and Environment Cabinet, the state's executive branch agency that has been delegated by the federal government primacy over environmental protection and coal mine permitting programs. The cabinet's mission also includes development of the state's energy resources in an environmentally responsible manner, including implementing programs for energy efficiency and renewable energy.

In October of last year, the Commonwealth of Kentucky intervened in support of the Kentucky Coal Association in its lawsuit against the U.S. Environmental Protection Agency. The grounds for the state's intervention differed somewhat from the Kentucky Coal Association's. Specifically, we took this very unusual step because we strongly believe the EPA's objections to recent proposed draft permits for Clean Water Act 402 permits for surface mining operations in Kentucky were arbitrary. The U.S. EPA, since April 1, 2010, when it issued its "Interim Final Guidance," is requiring Kentucky's regulators to adhere to permitting conditions that have not been promulgated through proper administrative protocols in line with the federal Administrative Procedures Act. Specifically, in our complaint, the Commonwealth of Kentucky contends that, notwithstanding the States' delegation under the Clean Water Act in developing water quality standards, and without promulgating a standard through required notice and comment procedures, EPA has since April 1, 2010, unlawfully reviewed, and objected to, 402 permits proposed for coal mining operations in six Appalachian states, including Kentucky, for compliance with an unpromulgated water quality standard for conductivity.

I'll give a little background on the situation specific to Kentucky. Between December 21, 2009, and March 18, 2010, EPA issued comment letters on 29 individual draft Clean Water Act 402 coal permits proposed by the Cabinet's Division of Water. In response to EPA's comments and after extensive discussions with EPA, the Division of Water included additional requirements in the draft permits. EPA did not object to the revised draft permits, and the permits were issued beginning in March 2010. Then, on April 1, 2010, EPA issued its "Final Interim Guidance" for Appalachian coal mining operations in six states seeking to establish new Clean Water Act permitting requirements regarding in-stream conductivity. A little more than a month later, EPA issued Interim Objection letters on 11 of Kentucky's Clean Water Act 402 coal permits drafted by the Division of Water, despite the fact that these permits were drafted *in the same manner as those permits issued immediately prior to the April 1 guidance*

that were deemed acceptable by EPA at that time. The Interim Objection letters referenced the April 1 guidance.

We responded to EPA's interim objections, stating that they were improper and instead they should be treated as comments to the permits. EPA replied to this response by taking the full 90 days to review the permits as allowed under law. On September 16, 2010, EPA issued its first formal specific objection letters. The agency has received 21 formal specific objection letters since September 16, 2010. Kentucky has since provided revised draft permits or permit actions to EPA with a request of a public hearing in response to each of these EPA specific objection letters. Resolution of this issue is still pending before EPA.

I'd like to point out that in its guidance documents, EPA acknowledges that, "coal is an essential part of our energy future" and that the EPA is "committed to an Appalachian economy that provides coal mining jobs within a strong, diverse, and sustainable Appalachian regional economy." However, the agency's actions since it issued the April 1 guidance are inconsistent with this assertion because we are faced with continuing uncertainty, and this uncertainty directly affects the business operations of coal companies and supporting industries.

As someone responsible for overseeing the state's environmental protection programs, I am by no means opposed to regulations necessary to protect our land, air, and water resources. We can and must do all that is reasonably possible to protect our environment and the lives and health of our citizens. At the same time, environmental permitting is not designed to stop legitimate business activities, but rather to ensure they are done in accordance with existing laws and regulations. Regulators and the regulated community need certainty in the process. In Kentucky, coal mining employs 18,000 people, brings in more than three and a half billion dollars from out-of-state each year, and pays more than a billion dollars in direct wages. Kentucky is the third largest coal producing state. And our low electricity rates, based on our primary production of electricity from coal, allow us to produce a large share of the nation's stainless steel, aluminum, automobiles, and other manufactured goods. It is for these reasons that Kentucky's Governor, Steve Beshear, reminds us that coal is not a local issue, it's not a state issue,

it's a national issue; and the importance of coal to our nation's economy and security cannot be overstated.

Coal can be and is being mined in an environmentally responsible manner—we continue to make improvements, and the industry has been willing to do things better. Coal production and use has an environmental impact—all sources of energy production and use have an impact—but existing laws and regulations are in place to minimize impacts and to reclaim mined land. That is why it is disconcerting to us that EPA has applied a specific water quality standard (that is, conductivity) to Appalachian coal mining—a standard that was based on, in our minds and in the minds of others, incomplete science. That EPA did not establish a Science Advisory Board to look into the science until after they started using the standard to object to permits is additionally troubling. Because of the variability and inconclusiveness of the data, establishing appropriate conductivity standards to protect water quality requires additional research, a point made, in fact, by the EPA's Science Advisory Board in its March 25, 2011, report.

Thus, we do not agree with the method (the issuance of interim final guidance) nor do we, quite frankly, agree with the certainty of the science. We filed suit against EPA on the method, and we are engaged in ongoing discussions with EPA and others on the science. From a regulatory viewpoint, we are concerned that “interim guidance” is not a legally defensible policy for the states or EPA, yet it is still being used as a basis to object to state-delegated permitting actions. Any guidance (interim or final) that goes beyond the scope of existing statutory or regulatory authority should not be imposed by EPA without having gone through the appropriate congressional or regulatory processes.

Furthermore, as a regulatory agency, we are concerned about interim guidance on conductivity standards for another reason—EPA is assuming that one size fits all regarding a numeric standard, as opposed to a narrative standard, which each of the Appalachian states affected by the EPA guidance has in place to meet the specific geographic conditions of the respective states. The scientific understanding of the water quality impacts from conductivity are still evolving, and it may be that, in fact, one size does not fit all.

There are many discussions regarding states' rights on this and other regulatory issues. Governor Beshear and I recognize and respect that EPA has a responsibility and obligation to revise and update regulations and program requirements as necessary to protect human health and the environment. However, EPA should not create new regulatory requirements that have not undergone the appropriate congressional or rulemaking processes. As it is, today EPA is preventing, through its objection process, the delegated states from issuing permits, with no recourse for the states or the regulated community.

I'll reiterate comments we made to ECOS on this issue: "EPA has insulated itself from judicial review in making formal objections to proposed permit actions by delegated states, and can therefore object to permits based on reasons that have not undergone the formal rulemaking process without the affected interests having any recourse." We recommend that the EPA permit objection process be revised to designate that a formal permit objection by EPA is deemed to be a final agency determination subject to potential judicial review by an affected or interested party. The process also needs to be revised to establish a specific deadline under which EPA is obligated to make a final permit determination in the event that EPA makes a formal permit objection and becomes the permitting authority for that permit action instead of the delegated state. It is troubling, that, absent a timeframe to make a final permit determination—whether that is permit issuance or permit denial—there is currently no obligation upon EPA to make any final permit action, leaving both the state and the regulated community in a prolonged state of uncertainty. This uncertainty costs jobs and affects the livelihoods of thousands of families in Appalachia.

I'll conclude by saying that we have not been silent on this issue with EPA, nor have we been in a combative relationship. The U.S. EPA is our partner in helping us to protect the environment and health of our citizens in Kentucky. As I mentioned, we respect their mission and authority to establish federal rules to ensure consistency and fairness across the nation in environmental protection. We certainly do not want a "race to the bottom" system. People on my staff and I have been in ongoing discussions with our regional EPA administrator (Region IV) attempting to resolve the issues to the satisfaction of all parties—the EPA, the state, the regulated community, and citizens of Kentucky. Unfortunately, I am not highly optimistic that such a resolution will occur.

Thank you again for the opportunity to provide comments today.